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In The
# Supreme Court of the United States

REDERIET OTTO DANIELSEN, A.S.;
K.S. ARIES SHIPPING,

*Petitioners,*

v.

BRIAN STACY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY CLUBS, THE AMERICAN INSURANCE ASSOCIATION, THE CHAMBER OF SHIPPING OF AMERICA, AND THE INTERNATIONAL CHAMBER OF SHIPPING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The International Group of Protection and Indemnity Clubs (the International Group) is an unincorporated association consisting of 13 principal underwriting associations (the P&I Clubs) that insure the liabilities of their shipowner and charterer members.[2] *See generally, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 2-10, at 76 (2d ed. 1975). Each P&I Club is an independent,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for each party received timely notice under Supreme Court Rule 37.2(a) of *amici*'s intent to file this brief and the parties consented to the filing of this brief.

[2] The 13 principal P&I Clubs comprising the International Group are: The American Steamship Owners Mutual Protection and Indemnity Association, Inc.; Assuranceforeningen Skuld (Gjensidig); The Britannia Steam Ship Insurance Association Ltd.; Gard P&I (Bermuda) Ltd.; The Japan Ship Owners' Mutual Protection & Indemnity Association; The London Steam-Ship Owners' Mutual Insurance Association Ltd.; The North of England Protecting and Indemnity Association Ltd.; The Shipowners' Mutual Protection and Indemnity Association (Luxembourg); The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd.; The Steamship Mutual Underwriting Association (Bermuda) Ltd.; Sveriges Ångfartygs Assurans Förening (Swedish Club); United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.; and The West of England Ship Owners' Mutual Insurance Association (Luxembourg).

non-profit, mutual insurance association, providing cover for its members against third-party liabilities relating to the use and operation of ships. The P&I Clubs cover a wide range of liabilities including personal injury claims by seamen under the Jones Act, 46 U.S.C. § 30104, or the general maritime law and by non-seamen under other statutes (such as the Death on the High Seas Act, 46 U.S.C. §§ 30301-08) or the general maritime law; claims for cargo loss or damage; pollution claims; claims arising out of collisions with fixed and floating objects; and claims for wreck removal. The P&I Clubs actively participate in handling claims for their members, including the appointment of lawyers, surveyors, and other experts, and the expeditious settlement of claims. Together, the P&I Clubs insure the liabilities of approximately 90% of the world's ocean-going ship tonnage and approximately 95% of the world's ocean-going tanker fleet. Virtually all oil tankers and dry cargo ships trading to the United States are entered with one of the P&I Clubs.

The International Group coordinates the operation and regulation of a claim-sharing agreement under which claims in excess of $8 million up to an amount of approximately $7.5 billion are shared by the P&I Clubs. The International Group also provides a forum for the P&I Clubs to develop common policy and promote shipowners' interests in relation to liability and insurance issues. More specifically, it provides an effective voice for the members of the individual P&I Clubs to speak collectively on important industry

issues (such as the definition of the appropriate legal standard to impose liability for personal injury claims). Thus the International Group regularly represents the P&I Clubs' interests in the preparation of international conventions and legislation affecting shipowners' liabilities and related insurance matters. It has similarly filed *amicus* briefs with this Court and other courts in cases that raise issues that are particularly important to the shipping industry. Further information about the International Group is available on its web site at www.igpandi.org.

The American Insurance Association (AIA) is a leading national trade association that includes some 300 major property and casualty insurance companies. AIA members, ranging in size from small companies to the largest insurers with global operations, collectively underwrote in excess of $117 billion in premiums in 2008. They underwrite virtually all lines of property and casualty insurance, including personal and commercial auto insurance, commercial property and liability insurance (including ocean marine and inland marine coverages), workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies in legislative and regulatory forums at the state and federal levels and files *amicus* briefs in significant cases before state and federal courts, including this Court. Further information about AIA is available on its web site at www.aiadc.org.

The Chamber of Shipping of America (CSA) is an organization founded in 1917 and currently representing 33 U.S.-based companies that own, operate, or charter ocean-going tankers, container ships, or dry-bulk vessels engaged in domestic and international trades. CSA also represents companies that maintain a commercial interest in the operation of ocean-going vessels. Current members include companies that own or operate U.S.-flag or foreign-flag ships. CSA has filed *amicus* briefs with this Court in some exceptional cases that raise unusually important issues for the shipping industry. Further information about CSA is available on its web site at www.knowships.org.

The International Chamber of Shipping (ICS) is the principal international trade association for merchant shipowners and ship operators. The membership of ICS comprises national shipowner associations and represents all sectors and trades and about 80% of the world fleet. ICS enjoys consultative status with the International Maritime Organization (IMO) and all other international regulatory bodies that impact upon shipping. The CSA is a full Member of ICS. Further information about ICS is available on its web site at www.marisec.org.

The P&I Clubs routinely handle claims against shipowners such as respondent's claim here. Although it happens that no AIA member was directly involved in this case, AIA's members cover maritime risks and could handle very similar claims in the future. More significantly, AIA's members recognize the influence

that federal maritime law decisions have had on the development of state common law in the past and thus the influence that the decision below could have in the future. AIA's members regularly underwrite insurance that would cover claims under state common law for the negligent infliction of emotional distress. CSA's members and the members of ICS's other national shipowner associations are exposed to claims such as respondent's.

All four *amici* anticipate that many more claims such as respondent's will arise if the Ninth Circuit's decision is allowed to stand. Thus each *amicus* has a deep interest in ensuring that the law is uniform and predictable; that liabilities are rationally and clearly defined; and that this Court understands the importance of the question presented here not only to the maritime shipping industry but also to the broader community.

## STATEMENT

The relevant facts are entirely straight-forward, thus offering this Court an excellent vehicle to resolve the legal issue presented. Respondent alleges – and in the current procedural posture his allegations must be accepted as true – that petitioners' vessel, while proceeding at an unsafe speed in dense fog, passed his fishing vessel at close quarters after having been on a collision course. Pet. App. 49a-50a. Thereafter (unbeknownst to respondent at the time) petitioners'

vessel collided with and sank another fishing boat, killing its captain. *Id.* 50a. Respondent, not yet suffering from emotional distress, resumed fishing. *Id.* 51a. Four or more days later, respondent finally learned of the fatal accident and alleges that he suffered serious emotional distress as a result. *Id.* 51a, 53a.

The district court dismissed respondent's claim for the negligent infliction of emotional distress. It reasoned that respondent had not experienced a psychic injury as a result of witnessing the accident. *Id.* 37a-38a. Despite that ruling, respondent declined to amend his complaint. *Id.* 57a.

Reversing, a divided panel of the Ninth Circuit held petitioners liable on the ground that respondent was in "the zone of danger" at the time of the fatal accident. The majority found it irrelevant that he did not know of the actual accident or suffer any emotional distress until days later (when he was safely out of the zone of danger). *See id.* 5a.

## SUMMARY OF ARGUMENT

1. This Court should grant certiorari to restore uniformity to the general maritime law of the United States on the proper standard for imposing liability for the negligent infliction of emotional distress. This Court has consistently recognized the importance of uniformity in maritime law, a field in which parties regularly travel across jurisdictional boundaries and

opportunities for forum-shopping abound. The decision below conflicts with decisions of the Third and Fifth Circuits. The conflict with the Fifth Circuit is particularly troubling in view of that court's prominence in maritime personal injury litigation.

2. This case involves not only an inter-circuit conflict but also an international conflict. This Court has recognized the importance of maintaining uniformity, to the extent possible, between U.S. maritime law and the laws of other maritime nations. The decision below is out of line with the governing law in other maritime nations. Under English law, for example, which has long been influential throughout the common-law and maritime law worlds, authoritative decisions of the House of Lords (the predecessor of the current U.K. Supreme Court) establish at least three reasons why a claimant in respondent's position could not recover for the negligent infliction of emotional distress. Under Danish law, to take a particularly relevant civil-law example, respondent's claim would also fail.

3. This Court should also grant certiorari to enforce the policies that it recognized in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *Gottshall* explained the importance of clear and predictable limits defining when damages may be recovered for the negligent infliction of emotional distress. Ignoring those policies, the Ninth Circuit has announced a misguided and erroneous rule that would adversely affect the entire maritime industry. This Court should correct the error now rather than permitting the

industry (and the judicial system) to be subjected to years of pointless litigation.

## ARGUMENT

### I. This Court Should Grant Certiorari to Restore Uniformity to the General Maritime Law on the Proper Standard for Imposing Liability for the Negligent Infliction of Emotional Distress

This Court regularly exercises its discretionary jurisdiction to promote uniformity in the interpretation of federal law, and the need for uniformity is particularly compelling in the maritime context. Unlike parties that are subject to the laws of only a single state and the interpretations of a single federal circuit, ships by their very nature call regularly at different ports in different jurisdictions. Companies that operate ships are typically subject to the laws of many countries and the interpretations of multiple federal circuits. Major shipping companies commonly do business in every maritime circuit and thus would be subject to those circuits' conflicting interpretations of federal law if this Court did not resolve the conflicts.

It would not be unusual for a single ship in the course of a single voyage to call at ports in three or four different circuits. Maersk Line, for example, operates a weekly service that calls at Savannah, Georgia (in the Eleventh Circuit) each Sunday;

Charleston, South Carolina (in the Fourth Circuit) on Monday; Newark, New Jersey (in the Third Circuit) on Wednesday; Miami, Florida (in the Eleventh Circuit) on Saturday; Los Angeles, California (in the Ninth Circuit) on the Wednesday eleven days later (after a stop in Panama); and Oakland, California (in the Ninth Circuit) on Friday. The ship then transits the Pacific to call at six Asian ports in four different countries. *See* Maersk Line, *Transpacific 7 (TP7) – Westbound*, http://www.maerskline.com/link/?page=brochure&path=/routemaps/newnetwork/transpacific/TP7%20WEB (last visited Jan. 3, 2011).[3] If this Court does not maintain the uniformity of the general maritime law, therefore, all those involved in each voyage would be required to adjust their behaviors to conform to a different interpretation of the law on an almost daily basis. That unfortunate result would "impose real costs on the commercial system the [maritime law] govern[s]." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995).

This Court has consistently recognized the special need to maintain uniformity in the interpretation of the general maritime law. For example, the Court recently explained "that Article III's grant of

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[3] Countless other examples could easily be given. *See, e.g.*, *Box Ship Sets Records*, PACIFIC MARITIME MAGAZINE 18 (Dec. 2010) (describing the liner service of the *CMA CGM Figaro*, the largest ship ever to call at several North American ports, which regularly serves ports in the Second, Fourth, Ninth, and Eleventh Circuits).

admiralty jurisdiction '"must have referred to a system of law coextensive with, and *operating uniformly* in, the whole country."'" *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004) (emphasis added) (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (which quoted *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875))). The *Kirby* Court cited over half a dozen of this Court's prior cases in support of the importance of uniformity in maritime law, dating back to *The Lottawanna*, *see* 543 U.S. at 28 (collecting cases), but the principle is even older. Almost two centuries ago, Justice Story on circuit justified his broad interpretation of the Constitution's Admiralty Clause by reference to "[t]he advantages resulting to the commerce and navigation of the United States from a uniformity of rules and decisions in all maritime questions." *De Lovio v. Boit*, 7 Fed. Cas. 418, 443 (C.C.D. Mass. 1815) (Case No. 3,776).

Petitioner has already explained why the decision below conflicts with prior decisions from the Third and Fifth Circuits.[4] Pet. 12-15. The conflict

[4] Petitioner claims a conflict with the Eleventh Circuit but cites only a district court decision from within the Eleventh Circuit. *See* Pet. 15-16 (citing *Tassinari v. Key West Water Tours, L.C.*, 480 F. Supp. 2d 1318 (S.D. Fla. 2007)). As *Tassinari* was not appealed to the Eleventh Circuit, no inter-circuit conflict has been documented. That case instead helps to demonstrate the confusion in the lower courts that calls for this Court's attention. Petitioner also claims that the panel below failed to follow the Ninth Circuit's earlier decision in *Chan v. Society Expeditions,*

(Continued on following page)

with the Fifth Circuit is particularly troubling because of that court's prominence in maritime personal injury litigation. In *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), the Fifth Circuit correctly anticipated this Court's holding in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), that the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, and thus the Jones Act, 46 U.S.C. § 30104,[5] permit recovery for the negligent infliction of emotional distress "for those within the zone of danger." 866 F.2d at 820. But it affirmed the district court's dismissal of the case (despite facts that were if anything more sympathetic to the *Gaston* plaintiff than respondent's allegations here). *Id.*

In *Gaston*, the plaintiff and his half-brother were working together on the deck of a barge. When the pushing vessel violently struck the barge, both seamen were thrown. The plaintiff landed on the barge's deck and his half-brother fell between the two vessels. While the plaintiff sought to render aid, he witnessed his half-brother's being crushed to death between the vessels. *Id.* at 816-817. Any distinction

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*Inc.*, 39 F.3d 1398 (9th Cir. 1994). *See* Pet. 16. But this appears to be a complaint over the proper characterization of certain aspects of the *Chan* opinion – an issue that the Ninth Circuit has now resolved against petitioner.

[5] This Court consistently has "held that the Jones Act adopts 'the entire judicially developed doctrine of liability' under the [FELA]." *American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958)).

between *Gaston* and the present case would favor the *Gaston* plaintiff. He actually witnessed the gruesome death of a close relative and as a result suffered immediate emotional distress. But the Fifth Circuit affirmed the dismissal of his case because he presented "no evidence . . . tending to show that [he] was ever concerned for his own safety." *Id.* at 819. Although the *Gaston* plaintiff was exposed to exactly the same risk as the victim of the fatal accident – it was mere happenstance which one fell to the deck and which one fell between the barge and the pushing vessel – he did not satisfy the Fifth Circuit's standard for the "zone of danger" test.

If the court below had applied the Fifth Circuit's standard, the present case would undoubtedly have been decided differently. Respondent alleged that he saw petitioners' vessel on his radar when it was still about a mile away. Pet. App. 50a (complaint ¶ 12). Although the vessel appeared to be on a collision course with his fishing vessel, there was still adequate time to avert the collision. Thus there was no reason for respondent to be "concerned for his own safety." He simply contacted petitioners' vessel by radio and it altered its course. *Id.* The most he can claim is that petitioners' vessel "passed at close quarters." *Id.* He made "no [allegation] . . . tending to show that [he] was ever concerned for his own safety." *Cf.* 866 F.2d at 819. In the Fifth Circuit, his claim would necessarily have been dismissed.

## II. This Court Should Grant Certiorari to Minimize Conflicts between U.S. General Maritime Law and the Laws of Other Maritime Nations

This Court has recognized not only the need to maintain the uniformity of the U.S. general maritime law but also the importance of keeping U.S. law in line with the laws of other maritime nations. *See, e.g.*, *Sky Reefer*, 515 U.S. at 536-537. Ships regularly call at ports in different U.S. circuits and it is essential that they be subject to the same rules in each port. But most ships also call at foreign ports. Although this Court lacks the power to ensure complete uniformity on an international scale, it can at least ensure that U.S. interpretations of the general maritime law do not fall significantly out-of-line with the laws of other maritime nations.

The practical importance of promoting international uniformity (to the extent possible) is just as significant as in the domestic context. The "real costs" imposed on the commercial system, *id.* at 537, are at least as onerous when a ship is subject to different rules in the ports of different countries as when she is subject to different rules in the ports of different circuits. Indeed, the *Sky Reefer* Court referred to the "real costs" imposed on the commercial system in the international context. *See id.* And this Court has consistently recognized the value of international uniformity in maritime law. *See, e.g.*, *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1875).

Despite this Court's recognition of the importance of international uniformity in maritime law, the decision below is significantly out-of-line with the laws of other maritime nations. *Amici* are aware of no other country in which a plaintiff suffering emotional distress could recover on the allegations that respondent has made here. Two examples (one from a common-law country and one from a civil-law country) illustrate the extent to which the Ninth Circuit has departed from international standards.

English law is particularly relevant, both for its influence on the development of the law in every other common-law country (including the United States) and for its prominence in the maritime legal community. Respondent could not succeed under English law for at least three independent reasons. The seminal authority is Lord Wilberforce's judgment in the House of Lords (the predecessor of the current U.K. Supreme Court) in *McLoughlin v. O'Brian*, [1983] 1 A.C. 410 (H.L. 1982). In *McLoughlin*, Lord Wilberforce, after discussing the same sort of policy concerns that this Court addressed in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 545-546, 557 (1994), recognized "a real need for the law to place some limitation upon the extent of admissible claims." [1983] 1 A.C. at 422. He identified three limitations: First, "the class of persons whose claims should be recognized" is generally limited to those with close

family ties.[6] *Id.* Second, the plaintiff must satisfy a requirement of "proximity to the accident." English law does not require "direct and immediate sight or hearing," but the plaintiff must have "'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath.'" *Id.* (quoting *Benson v. Lee*, [1972] V.R. 879, 880 (Vict. S. Ct.)). Third, "[t]he shock [*i.e.*, the emotional distress] must come through sight or hearing of the event or of its immediate aftermath." *Id.* at 423. "[T]here is no case in which the law has compensated shock brought about by communication by a third party." *Id.* at 422-423. In *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 (H.L. 1991), the House of Lords unanimously approved Lord Wilberforce's three requirements.

Applying Lord Wilberforce's three requirements to respondent's allegations, the present case would be dismissed on each of the three independent grounds. Respondent fails to satisfy the first requirement

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[6] Lord Wilberforce did not say that the class of persons must always be limited to those with close family ties. He explained:

> [C]ases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration.

[1983] 1 A.C. at 422. Thus the long-time friendship in *Gottshall*, *see* 512 U.S. at 536, might have been adequate under English law.

because he had no relationship whatsoever with the fisherman who was killed in the tragic collision. Not only did he lack a close family tie, he did not even allege that he knew the decedent. Second, respondent fails the "proximity to the accident" requirement because he had no direct perception of any of the events that made up the accident or its immediate aftermath. He heard petitioners' vessel pass his but he does not allege any direct perception of the fatal accident on which he bases his claim. When he was in the general vicinity of the accident, he was not even sure that an accident had occurred. When respondent "advised all concerned by radio" that he was safe, the "search was . . . suspended and [he] resumed fishing," Pet. App. 51a (complaint ¶ 15), apparently because "all concerned" assumed that no collision had occurred after all. Finally, respondent fails the "communication" requirement because respondent's knowledge of the fatal accident, which is the basis for his emotional distress claim, was "brought about by communication by a third party."

Recovery for the negligent infliction of emotional distress would be just as difficult for the respondent under Danish law. *Amici* have chosen Danish law as a civil-law example for two principal reasons. First, Denmark is a prominent maritime nation. Indeed, the world's largest shipping company is Danish. Second, respondents are Danish companies. Although respondents could not reasonably expect Danish law to govern all of their activities wherever they travelled,

that would nevertheless represent the legal system with which they were most familiar. And to the extent that they anticipated any international uniformity in maritime law, Danish law would most likely guide their expectations.

Danish commentators conclude that only the most closely connected relatives of a victim may hope to obtain compensation for the negligent infliction of emotional distress when they have not themselves been involved in an accident but have instead witnessed it. *See, e.g.*, BO VON EYBEN & HELLE ISAGER, LAEREBOG I ERSTATNINGSRET 272 (6th ed. 2007). It appears that no decision of a Danish court, however, has actually awarded damages. Even under the most optimistic interpretation of Danish law, therefore, respondent's claim would fail. He did not even allege that he knew the decedent, let alone that he was a closely connected relative.

## III. This Court Should Grant Certiorari to Enforce the Policies Recognized in *Gottshall* and Avoid the Flood of Baseless Litigation that the Ninth Circuit's Decision Would Be Likely to Provoke

In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court recognized the continuing need for significant limitations on the right to recover for

the negligent infliction of emotional distress.[7] In justifying its adoption of the "zone of danger" rule, for example, the *Gottshall* Court explained:

> [T]he common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they all continue to give caution to courts. We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well founded.

*Id.* at 557; *see also id.* at 545-546. Earlier in its opinion, the *Gottshall* Court had expressly criticized the Third Circuit for ignoring those policy concerns. Even if the lower court's approach could have guarded against trivial and fraudulent claims, it did not address "the specter of unlimited and unpredictable liability." The *Gottshall* Court explained:

> A more significant problem [than fraudulent and trivial claims] is the prospect that allowing [actions for negligently inflicted emotional distress] can lead to unpredictable and

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[7] The *Gottshall* Court had previously explained that "significant limitations . . . are placed by the common law on the right to recover for negligently inflicted emotional distress, and have been since the right was first recognized late in the [19th] century." 512 U.S. at 545.

> nearly infinite liability for defendants. The common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover. This concern underlying the common-law tests has nothing to do with the potential for fraudulent claims; on the contrary, it is based upon the recognized possibility of *genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct.

*Id.* at 552. Not only did the Third Circuit's test fail to deal adequately with the specter of unlimited liability, it "would be bound to lead to haphazard results." *Id.* The *Gottshall* Court observed that "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury," that the Third Circuit's test could limit potential liability "only inconsistently," and that potential defendants "would be given no standard against which to regulate their conduct." *Id.*

All of the *Gottshall* Court's criticisms of the Third Circuit's test apply with equal force to the misguided rule adopted by the Ninth Circuit. Most fundamentally, the decision below raises the specter of unlimited and unpredictable liability. By selectively quoting

excerpts of the *Gottshall* opinion out of context,[8] the decision below could be read to establish a rule whereby any person who was once in the vicinity of a negligent defendant can recover for the negligent infliction of emotional distress if he or she thereafter learns that the defendant's negligence injured another person (even if the plaintiff neither witnessed the accident nor knew the victim). In her dissent, Judge Hall poses an extreme hypothetical to illustrate the potential for unlimited and unpredictable liability, Pet. App. 26a-27a & nn.5-6, and the majority actually admits that its rule would produce that extreme result, Pet. App. 6a n.2.

The potential for "fraudulent and trivial claims" is obvious. As the *Gottshall* Court observed, "the authenticity of claims for emotional injury . . . are far less susceptible to objective medical proof than are

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[8] It is telling that the Ninth Circuit quotes only the *Gottshall* Court's partial description of the common-law "zone of danger" test. Pet. App. 4a-5a. In the portion of the opinion that actually adopts the governing test, the *Gottshall* Court describes it very differently: "Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury *caused by fear of physical injury to himself*, whereas a worker outside the zone will not." 512 U.S. at 556 (emphasis added). Respondent's emotional distress, however, was not "caused by fear of physical injury to himself." As discussed above (at 12), he made "no [allegation] . . . tending to show that [he] was ever concerned for his own safety." *Cf. Gaston v. Flowers Transportation*, 866 F.2d 816, 819 (5th Cir. 1989). Respondent's alleged emotional distress was instead caused by his learning about another fisherman's death four or more days after the fact when he himself was not even arguably in any "zone of danger."

their physical counterparts." 512 U.S. at 552. Even if the courts are able accurately to distinguish genuine claims from fraudulent and trivial claims, full trials (with all the attendant inconvenience and expense) may often be necessary.

The Ninth Circuit's test would also "lead to haphazard results," as potential liability is limited "only inconsistently" and potential defendants "would be given no standard against which to regulate their conduct." For example, the court below does not explain why it thought respondent was in the "zone of danger." He alleged that his vessel and petitioners' vessel "appeared to [have been] on a collision course," Pet. App. 50a (complaint ¶ 12), but collision courses are routine in navigation. So long as at least one of the vessels alters its course or speed in time to avoid a collision, which is what happened here, there is no particular danger. He also alleges that the two vessels passed "at close quarters," *id.*, but that is not necessarily dangerous, either. Vessels often pass at close quarters without incident.[9] More fundamentally,

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[9] The leading U.S. treatise on the rules of navigation explains:

> It should be noted that not every close-quarters situation involves risk of collision. For example, two vessels in sight and passing each other in opposite traffic lanes at a range of five hundred yards are likely in close-quarters, but the encounter does not necessarily involve risk of collision. . . .

CRAIG H. ALLEN, FARWELL'S RULES OF THE NAUTICAL ROAD 253 (8th ed. 2005) (footnote omitted).

the Ninth Circuit requires no causal connection between a plaintiff's presence in the zone of danger and the emotional distress for which damages are claimed. *See* Pet. App. 5a. When the factor triggering liability bears no relationship to the damage suffered, results are bound to be haphazard and inconsistent, thus giving potential defendants "no standard against which to regulate their conduct."

Perhaps the district courts in the Ninth Circuit, with interventions from the court of appeals, could sort out more workable standards through several years of litigation. But years of such pointless litigation would adversely affect the entire maritime industry. Nothing would be gained by allowing the issue to percolate further. The Ninth Circuit's decision is simply misguided and erroneous. Correcting the problem requires more than clarification. This Court should grant certiorari to enforce the policies that it recognized in *Gottshall* and impose clear and predictable limits defining when damages may be recovered for the negligent infliction of emotional distress.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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